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# **Legal Positivism, Natural Law & Normativity**

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Undergraduate Honors Thesis

University of Vermont Department of Philosophy

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# Abstract

In this thesis, I discuss and evaluate five theories of jurisprudence explaining how each one answers two central questions. The first, the Grounding Question, asks what it is that makes something a law. The second question, the Normative Question, asks why it is that laws ought to be followed. I use these questions to establish four desiderata for a theory of jurisprudence: a satisfactory theory must answer the Grounding Question and explain its answer, and it must do the same for the Normative Question.

The five theories fall into two historically opposed categorizations: legal positivism and natural law theory. In section 2, I explain three positivist and two natural law theories, highlighting how each answers the central questions. In section 3, I discuss two more desiderata that help to explain some of the motivations for holding each view. Finally, in section 4, I compare each theory's answer to the central questions. I find that while each theory has a satisfactory answer to the Grounding Question, their answers to the Normative Question differ in strength. While the views have historically been opposed, I find that the strongest version of positivism and natural law theory are “inclusive” legal positivism and “weak” natural law theory, compatible theories that bear striking resemblances to one another.

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# Section 1: Introduction

In the philosophy of law, legal positivism and natural law theories have historically taken opposing positions. Their deepest disagreement concerns what type of reasons, if any, people have to follow the law. Traditionally, the positivist position has been that sanctions provide people with reasons to obey the law, while the natural law position has been that there are moral reasons to obey the law. In this thesis, I wish to examine several recent versions of positivism and natural law theory, evaluating how each one addresses the question of whether there are reasons to follow the law.

Positivism, the newer of these views, arose from the work of John Austin, a staunch critic of the notion that laws must be consistent with ethics (Austin 1832). However, for the purposes of this thesis, I consider the work of three positivists: H. L. A. Hart, Joseph Raz, and Kenneth Einar Himma. While Austin presented the first positivist theory, Hart developed Austin's work to create a much more influential and sophisticated form of positivism (Hart 1957). Raz and Himma each develop Hart's work in different directions, as I will explain in section 2 (Raz 1979, 1985 & Himma 2001, 2011, 2014, 2020).

Natural law theory traces its roots back to Thomas Aquinas, but as with the positivists I will explore more contemporary and sophisticated versions of this theory. I first consider the work of John Finnis, who revitalized natural law theory with his influential account of law, *Natural Law and Natural Rights* (Finnis 1980). After that, I will consider the work of Mark Murphy, who criticizes some of Finnis' work and modifies his conclusion. Where Finnis offers a so-called "strong" natural law theory on which one has strong reasons to follow any law, Murphy offers a so-called "weak" natural law theory on which laws that are not backed by strong reasons for obedience are defective. I'll discuss each of these claims much more thoroughly in section 2, in the subsection on natural law theorists (Murphy 2006).

The debate between these two camps has often been summarized with pithy slogans meant to represent each position. The positivist position has been summarized in versions of the claim that “laws have no necessary connection to morality” and the natural law position has been similarly summarized by versions of the slogan “an unjust law is no law at all”. It will become apparent that each of these slogans is an oversimplification. The positivists have different views regarding the relationship between law and morality, and some natural law theorists agree that unjust rules may be enforced by a government. My discussion in section 2 will reveal the nuances of these theories in much greater depth.

## **A Note on Terminology**

Before beginning, it is important to clarify my use of certain terms. Throughout this thesis, I will frequently use the terms “reason” and “obligation”. When discussing obligations to the law, I’m referring to particularly strong reasons for following the law. This usage comports with the usage of the theorists I present, although Raz argues that no such obligation exists. In my discussion of Murphy, I will also use the word “authority” to express the same concept, matching his usage. Raz and Finnis have different understandings of authority than this one, as I will explain in section 2.

## **Central Questions**

I frame my discussion of these theories using two questions that each theory aims to answer. The first is:

**The Grounding Question:** In virtue of what is something a law?

This question drives at what grounds law, or what makes something a law. This is one of the most fundamental questions in jurisprudence, a high priority for either of these theories to answer. As I'll explain, the theories offer different answers to this question, each of which is successful.

In posing the Grounding Question, I make the modest assumption that “positive laws” exist. By positive laws, I broadly mean rules of conduct for citizens that are enforced by the government. As will become apparent, positivism and natural law theories have different explanations of why positive laws hold. So in answering the Grounding Question, each theory must satisfy two desiderata:

A) An acceptable legal theory must imply that there are positive laws (i.e., rules enforced by governments).

B) An acceptable legal theory must explain why these positive laws hold.

The Grounding Question bears on a second central question of jurisprudence, namely:

**The Normative Question:** In virtue of what is the law normative?

The Normative Question drives at why the law ought to be followed. In posing this question, I also make a certain assumption. It is that people, in general, have some kind of reason to follow the law most of the time. In other words, people are in some sense warranted when they follow the law; whether because it is the right thing to do, because it is wise, or for some other type of reason. I do not commit myself to there being a particular type of reason to obey the law; as we will see, positivists and natural law theorists disagree about what kind of reason people have to follow the law. Like the Grounding Question, the Normative Question gives rise to two desiderata:

C) An acceptable legal theory must show that citizens generally have strong reasons to follow the law.

D) An acceptable legal theory must explain why there is reason to follow the law.

In section 2, I will survey three positivist and two natural law theories, explaining each view's answer to the Grounding and Normative Questions. Then, in section 3, I introduce two more desiderata which these theories aim to satisfy, with the goal of explaining some of the underlying motivations for holding each theory. These are that a theory must show that there is a difference between positive law and morality, and that a theory must comport with a certain "privileged viewpoint" of the law. I use this term to refer to the idea that positivists seek to explain the law as regular citizens understand it, where natural law theorists seek to explain the law as reasonable citizens understand it.

In section 4, I evaluate the five theories using the four desiderata listed above. I conclude that while each theory answers the Grounding Question satisfactorily, Himma offers the strongest positivist answer to the Normative Question and Murphy offers the strongest natural law answer to the Grounding Question. Interestingly, while positivism and natural law theory have historically been opposed, these two theories are strikingly similar.

## **The Significance of The Central Questions**

Every day, people have countless interactions with the law, from signing contracts, to voting, to receiving parking tickets. The point of the Grounding Question is to understand why these particular rules are law, rather than some other set of rules for conduct. Answers to the Grounding Question will tell us what sets the law apart from other kinds of rule.



The Normative Question attempts to uncover why the law affects our reasons for action in the way that it does. This question is important partly because its answer can help us to answer other central questions about the law's normative status: When is the law justified? Which positive laws should be passed? What kind of punishments are warranted for breaking the law?

While these may seem like abstract questions of theory, it is important to remember that peoples' interactions with the law are impacted by how officials answer the Grounding and Normative Questions. Take, as an example, a judge who thinks that some rule is law in virtue of receiving a majority vote in the legislature. If this judge's decisions are to be consistent with his answer to the Grounding Question, he should refuse to enforce any government mandate that has not received a majority vote in the legislature. Officials' answers to the Grounding Question impact what they understand the law to be, which in turn impacts how they make decisions that affect everyone in the legal system.

Answers to the Normative Question have practical implications as well. For example, some people criticize judges who use moral reasoning to decide cases as "activists". Answers to the Normative Questions can help us understand this kind of criticism. If there are not moral reasons to obey the law, perhaps these judges should refrain from using moral reasoning to decide cases. But if there are, the moral reasoning of the judge may be relevant in deciding whether someone is guilty and how severely they should be sanctioned. So while each of these questions is of theoretical importance for jurisprudence, their answers also impact how citizens interact with the law. This is because officials will wield the coercive force of the law differently depending on their views about what makes something a law and why laws should be followed.

## Section 2

## The Claims of Positivism

While the positivists who I discuss have different answers to the Grounding and Normative Questions, all of them embrace versions of certain claims that are central to positivism. I will discuss several of these claims in more detail in section 3 of this thesis, but some of them are worth mentioning here in order to clarify the theory of each positivist that I will discuss.

One unifying claim that appears in each of these positivist theories is the idea that the answer to the Grounding Question will ultimately advert to social facts; the positivists describe laws as social rules which are backed by social pressure. The positivist answer to the Grounding Question is that some rule is a law in virtue of conforming to a rule of recognition, which is the rule in a legal system that describes the characteristics something must have in order to count as law. This is a key insight from Hart, which is developed by Raz and Himma.

Positivists take this insight to imply that since the rule of recognition is a social rather than a moral rule, it need not specify moral grounds for law. This idea is encapsulated in the Separation Thesis, which roughly states that there are no moral criteria for law, so laws can be inconsistent with moral rules. I will discuss the Separation Thesis more thoroughly in section 3, as a way for positivism to satisfy the desideratum that it distinguish positive laws from moral rules. However, it is worth mentioning it here because disagreement about how to interpret the Separation Thesis underlies the largest division in positivism, which is between inclusive and exclusive positivism.

Hart and Himma are considered inclusive positivists, whereas Raz is considered an exclusive positivist. What these classifications have in common is that they accept the Separation Thesis. The difference between them is how strongly they read the Separation Thesis. The inclusive positivists take the Separation Thesis just to mean that since not every rule of recognition has to establish morality as a requirement for law, it is possible for laws to be inconsistent with ethical rules. Exclusive positivists take the Separation Thesis to mean that rules of recognition *must not* contain an

ethical requirement for law. This implies that something cannot be law in virtue of an ethical requirement, as those cannot be included in the rule of recognition. I will explain exclusive positivism further in my discussion of Raz, and inclusive positivism further in my discussion of Himma.<sup>1</sup>

While the positivists have a clear answer to the Grounding Question, their answer to the Normative Question is less clear. The positivists discussed in this thesis endorse the idea that the normativity of the law is closely related to social pressure which makes disobeying the law result in unpleasant consequences for those who violate it. This leads Himma to conclude that if there is any inherent reason to follow the law, it must be a self-interested reason of prudence rather than a moral reason. My discussion of how each positivist responds to the Normative Question will explain why an appeal to prudential reasons is the only answer available to these positivists.

## **Hart**

As I indicated earlier, Hart offers one of the first sophisticated developments of positivism. Hart refined the work of John Austin, criticizing his view that all laws are orders backed by threats that are handed down from a determinate political sovereign to his subjects (Austin 1832, 6). According to Austin, the sovereign was an individual or group whose orders were habitually followed by most of society, and who was not in the habit of obeying anyone else's orders (Austin 1832, 199-200). Commands, Austin claims, are just explicit or tacit expressions of a wish that someone else do something (Austin 1832, 7). So in saying that some action is illegal, what Austin means is that the community in question habitually follows the orders of some sovereign person or group which had forbidden the action on threat of punishment.

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<sup>1</sup> While Hart is regarded as an inclusive positivist, he was writing before the inclusive/exclusive distinction was introduced. This is why I focus on Himma when comparing inclusive and exclusive positivism.

In his seminal work *The Concept of Law*, Hart exposes several flaws in this view. First, there are counterexamples to the idea that all laws are simply orders backed by threats. Some laws allow people to create wills, contracts, and marriages, and otherwise change their legal relationships with others (Hart 1957, 28). Sovereigns do not generally command citizens to create wills or to get married, and there is generally no punishment for failing to do these things. Second, orders backed by threats do not explain the continuity of the law. When a sovereign dies, citizens do not yet have a habit of obedience to his successor, and it's unclear how the successor could establish that habit (Hart 1957, 52). Third, this account does not explain how laws persist. Laws made hundreds of years ago may still be in effect although the sovereign who commanded them is long dead, and any habit of obedience to them has dissipated (Hart 1957, 63). Finally, Austin's command theory has trouble making sense of modern democracies, since the sovereign is a group of people who must follow their own rules. This complicates the habit of obedience, because the sovereign is not supposed to habitually follow the orders of anyone else (Hart 1957, 75).

Because of these flaws in Austin's theory, Hart attempts to describe the law in other terms. Instead of claiming that all laws are orders, Hart defines laws as a type of social rule. While people often follow the rules laid down in the law, Hart points out that an obligation to obey those rules is separable from a habit of obedience. Hart illustrates this using the example of a mugger threatening to shoot someone if they do not empty their pockets. While most people would likely follow the mugger's command in that situation, Hart points out that it seems wrong to say that the victim has an obligation to pay the mugger. Rather, Hart states that the victim of the mugging is only "obliged" to follow the command, meaning he has a psychological inclination to do so. As I'll explain, conforming to an obligation involves more for Hart than doing something for fear of consequences or hope of benefit (Hart 1957, 82-83).

While a habit of obedience can be created by threatening people into following your commands, an obligation implies the existence of a rule. Since Hart sees the law as a social phenomenon, he describes laws as social rules. In order for some standard to be a social rule, there must be a general habit of obeying it, but more is required as well.

According to Hart, in order for social rules to exist people must take a certain “internal” perspective with regard to the content of those rules. Taking the internal perspective regarding a rule entails seeing the rule as a proper guide to conduct and seeing a deviation from the rule as grounds for criticism (Hart 1957, 55-56). Hart compares the internal perspective to the point of view of someone playing a game, as opposed to spectating. If we were to watch a game of basketball, we’d be able to notice certain patterns of behavior, like that the players try to avoid leaving the rectangle painted on the court while playing the game. In order to go beyond the pattern of behavior and understand why the players do this, we need to put ourselves in the shoes of a basketball player. They do not simply use the rule to predict how other players act, but also use it as a standard of conduct to guide their actions.

So according to Hart, laws are social rules that guide action when they are internalized. This has normative implications that I’ll unpack later. For now, I want to emphasize that, according to Hart, there are two types of social rule. Primary rules simply direct someone to do or not do something, making a certain behavior in some sense obligatory (Hart 1957, 81). These are quite common in criminal law, comprising laws against stealing, wanton violence, and all kinds of conduct. It’s easy to see how Austin classified all laws as orders backed by threats when we consider the most common examples of primary rules in the legal system: prohibitions against stealing, violence and the like, which carry sanctions.

Secondary rules are rules that determine how primary rules can be made or changed. Hart lays out three types of secondary rule, each of which he considers a “step from the pre-legal to the

legal world” (Hart 1957, 94). In other words, as each of these secondary rules is introduced, the system of rules comes to more fully instantiate a legal system.

The three types of secondary rules which Hart describes are rules of recognition, rules of change, and rules of adjudication. The first of these is the most important, and I’ll leave explaining it for last. Rules of change, as the name suggests, tell us the procedure for modifying and repealing primary rules that are already on the books (Hart 1957, 95). Rules of adjudication tell us about the jurisdiction of primary rules, including where those rules apply, who is to determine when one has been violated, and what procedure should be followed in determining guilt (Hart 1957, 96). Rules of change and adjudication are intimately connected with the most important type of secondary rules, rules of recognition.

Rules of recognition lay out the features that a rule must have in order to be law, including the procedure that a rule must go through in order to be valid in the legal system. When a rule of recognition identifies a rule as law, this indicates that the social group to which the law applies will exert social pressure on its members to conform with the rule (Hart 1957, 94).

Rules of recognition supply the positivist answer to the Grounding Question. Some rule is law in virtue of fulfilling a rule of recognition’s requirements. This entails some group taking the internal perspective to the rule and seeing it as a proper guide for conduct, and that group exerting social pressure on those who do not conform to it. As I’ll discuss later, contemporary positivists have added to and modified this requirement.

According to Hart, not all rules are obligations—rules of etiquette, for instance. They count as rules because some people take the internal perspective to them; but Hart does not think that they are obligations, as there are not serious consequences for breaking them (Hart 1957, 86).

Rules that do constitute obligations, such as primary rules of law, are those for which “the general demand for conformity is insistent and the social pressure brought to bear on those who

deviate or threaten to deviate is great” (Hart 1957, 86). Here, Hart is saying that people have particularly strong considerations in favor of following the law. Breaking laws can lead to fines, jail time, and sometimes other consequences such as unemployment or scathing criticism.

Hart’s answer to the Normative Question is unclear because Hart explicitly states that what makes following the law obligatory is social pressure brought to bear on violators, so it initially seems like those who are punished for breaking the law are obliged (in Hart’s sense) to follow it. If this reading of Hart is correct, then not everyone in the society in question is obligated to follow the law. Everyone would be obliged to follow the law, and presumably only those who take the internal perspective would be obligated.

Yet Hart discusses the fact that obligations can exist for people even if they are not aware of them. He says that some people, like “hardened swindlers”, do not feel obliged to follow the law although they are obligated to do so (Hart 1957, 88). This suggests that those who do not take the internal perspective to the law do have an obligation to follow it although they may not even feel obliged to do so. What should we make of this obligation? It’s clear that Hart does not think of it as a moral obligation. Hart claims that all primary rules of law constitute some kind of obligation, but also states that there is no requirement that these primary rules be morally acceptable (Hart 1957, 185). This reflects the Separation Thesis, the crucial desideratum of the positivists which asserts that legal obligations need not be consistent with ethics.

If we have some obligation to follow laws that are not moral, one possibility is that Hart thinks of the obligation to follow the law as a type of prudential obligation. He may mean that due to sanctions, it is unwise for someone to disobey laws, since being punished is not in their own self-interest. As I’ll discuss below, this is the view adopted by Himma, a contemporary positivist.

## **Raz**

Although he rejects the positivist label, Hart's student Joseph Raz has done significant work developing Hart's ideas into a more controversial theory that is widely regarded as a form of "exclusive" positivism, as opposed to the "inclusive" positivism of Hart and Himma.

As I've explained, the difference between exclusive and inclusive positivism lies in how strongly they interpret the Separation Thesis. Exclusive positivists such as Raz interpret the Separation Thesis to say that rules of recognition cannot ground the law in ethical requirements. So, for reasons I'll explain, Raz believes that a rule of recognition cannot contain a requirement such as "in order to be law, a rule must be ethical." According to Raz, such a clause would undermine a conceptual requirement of law, which is that it claims legitimate authority.

In answering the Grounding Question, Raz agrees with much of Hart's work, including the importance of a rule of recognition and social pressure, although Raz notes that legal systems can have multiple rules of recognition (Raz 1980, 199). However, Raz also adds a requirement in answering the Grounding Question: some norm is law partly in virtue of the fact that it claims legitimate authority.

In order to understand what Raz means by the law claiming legitimate authority, we must first understand how Raz defines authority. For Raz, to have authority is to have the ability to change "protected reasons" for other people. In order to explain protected reasons, I will explain Raz's idea of exclusionary reasons.

Raz defines an exclusionary reason as a reason against acting on the basis of another reason. To explain this, Raz uses the example of two parents who give their child opposing orders. The mother tells her son to put on his coat, while the father tells him not to listen to his mother. Presumably, each of the parents' orders constitutes a reason for action for the child. The fact that the child's mother told him to wear a coat is a reason for him to do so, but the father's order gives



the child a reason against acting on the mother's order. So, the child has a reason to put the coat on, and an exclusionary reason against acting on that reason (Raz 1979, 17).

To understand why the mother's order is not the exclusionary reason in this situation, consider that the father did not order his son to refrain from wearing a coat. Rather, he tells the child to disregard the reason given by the mother. The child could follow that command and completely ignore his mother's order but still put the coat on for another reason, such as being cold. The exclusionary reason given by the father is not a reason against putting on the coat, but a reason against putting on the coat *because of* the mother's order. Rather than just tip the balance of reasons against wearing a coat, the father's order "excludes" the mother's order as a relevant reason.

Protected reasons are reasons for action which also serve as exclusionary reasons against other reasons (Raz 1979, 18). This type of reason is "protected" in the sense that because it is also exclusionary, it is a reason to disregard potential competing reasons for action. The way that protected reasons exclude countervailing reasons for action leads Raz to assert the Pre-emption Thesis, which states that an authoritative requirement is a reason which not only adds to the balance of reasons, but which also replaces some of the other relevant reasons (Raz 1985, 299).

For Raz, authority is the ability to change protected reasons for others (Raz 1979, 19). Some norm is a law partly in virtue of the fact that it claims legitimate authority. Raz describes what he means by "legitimate" authority in the Normal Justification Thesis, which states that someone should be acknowledged as an authority if by giving orders to others, they make other people more likely to act on the balance of reasons that already apply to them (Raz 1985, 299). In many situations people have reasons for action that they do not appreciate, but legitimate authority will cause them to act as if they do appreciate all reasons that apply to them. For example, suppose that apples are healthy and delicious, and there is a balance of reasons in favor of eating apples for anyone. In that situation, it would be legitimate to use authority to promote apple consumption.

Raz uses the idea that the law claims authority to answer the Normative Question differently than Hart. He does this using a series of deductions about the concept of authority. Raz says that if the law claims authority, it must be the type of thing which is capable of having authority (Raz 1986, 9). For example, objects like lamps cannot have authority, so it wouldn't make sense for anyone to claim that a lamp has legitimate authority. Someone making that claim either misunderstands the nature of trees or the nature of authority, or they are being insincere. Since Raz takes the law to be sincerely claiming authority, he argues that the law must be in a class of things, which unlike lamps and trees, are capable of having authority.

On Raz's view, the fact that the law claims legitimate authority means that it must be capable of having legitimate authority. To be capable of having legitimate authority is to be capable of changing protected reasons for others in a way that encourages them to act on the balance of reasons that already exist for them. This is where Raz commits to exclusive rather than inclusive positivism. He claims that if people have to morally evaluate the law before deciding whether to follow it, the law would not be capable of legitimate authority (Raz 1985, 304). This is because the Pre-emption Thesis: legitimate authority's directive is meant to replace or "preempt" the other reasons which people have for acting, counting out some excuses for noncompliance. Raz believes that this would be impossible if people had to draw a moral conclusion about the law in order to recognize it. People who evaluate the law not to be moral will disregard the law and it will fail to change the balance of their reasons, but even those who follow the law will not satisfy the Pre-emption Thesis. In identifying the law, they evaluate it as moral, meaning they independently appreciate a balance of moral reasons in favor of following the law. The authoritative order does not replace any of their reasons for action because they accept the order only on the basis of those reasons.

For Raz, legitimate authority is there to settle issues of competing reasons by excluding some reasons from the deliberation. However, if we use moral criteria to identify authority, we identify authority using those very competing reasons. This undermines the law's capability to be a legitimate authority because the law can no longer satisfy the Normal Justification Thesis. Without creating exclusionary reasons, the law cannot push people in the direction of reasons that already apply to them; so it cannot have legitimate authority.

Although for Raz the law must claim legitimate authority, he does not think that the law actually has legitimate authority. In fact, Raz claims that there is no *prima facie* reason to obey the law even when the law is just (Raz 1979, 233). In other words, while the social pressure that supports the law ensures that it always has *de facto* authority, Raz believes its claim to *legitimate* authority is almost always false (Raz 1985, 300). This suggests that Raz may think of many people as obliged, or merely motivated to follow the law rather than obligated. If he does think that people are obligated to follow the law in any sense, he must mean this in a prudential sense.

In summary, Raz adds the requirement that law claim legitimate authority to Hart's answer to the Grounding Question. This addition leads him to a different understanding of the Separation Thesis, namely, that there cannot be moral criteria for law. This informs Raz's answer to the Normative Question, which is that people generally do not have good reasons to follow the law.

## **Himma**

Kenneth Einar Himma is a contemporary inclusive positivist who broadly agrees with Hart, but has modified some components of his theory. Himma's answer to the Grounding Question is very similar to Hart's, but he gives a clearer answer to the Normative Question, identifying obligations to follow the law as prudential in nature. Additionally, Himma argues convincingly against Raz's conclusion that a rule of recognition cannot contain ground the law in ethical requirements,

supporting an inclusive positivist account on which there can be moral criteria for law. I'll now explain Himma's response to Raz before discussing his modifications to Hart's theory.

While Himma doesn't challenge Raz's idea that law claims legitimate authority, he points out that even if it does, this claim could be conceptually confused. Himma's example of a conceptually confused claim is "the weather is tall" (Himma 2001, 66). Because weather cannot be tall, this claim is nonsense. But if someone does not understand the concept of tallness, they could sincerely make such a claim. So perhaps when the law expresses the claim that it has legitimate authority, the claim is sincere, but it is nonsense, so it does not imply that the law is among the class of things which can have legitimate authority.

Raz attempts to show that the law cannot be conceptually confused in its claim of authority by asserting that "given the centrality of legal institutions in our structures of authority, their claims and conceptions are formed by and contribute to our concept of authority" (Raz 1985, 302). The idea here is that if officials were conceptually confused about what it meant to have authority, people would adjust their concept of authority to conform with the views of officials. So people would eventually take the officials' conception of authority to be the correct one. Strangely, the way that Raz uses this section to defend against the possibility of conceptual confusion suggests that what people believe about authority impacts the actual, correct concept of authority.

According to Himma, the trouble here is that Raz allows that the concept of authority is partly conventionalist, or partly determined by how people think of authority (Himma 2001, 71). If Raz allows that the behavior of governments and citizens can change the concept of authority, this suggests that societies can have different concepts of authority than the one Raz describes. Himma points out that Raz gives us no reason to believe that we do not live in such a society. The only way to prove this would be through a social scientific poll about peoples' conception of authority, something that Raz does not attempt. It even seems plausible that we live in a society with a

different concept of authority than the one described by Raz; after all, the notion of authority he describes is far from being universally accepted by officials (Himma 2001, 73-74).

Himma also offers a positive argument in favor of inclusive over exclusive positivism. He defends the claim that some possible rule of recognition for some possible legal system contains moral criteria for law. To do this, he argues for the existence of a possible world in which people are morally infallible but not morally impeccable. By this, he means that everyone knows what the correct moral action is in every situation, but that their will is not always strong enough to do the right thing. This society's rule of recognition is simply that all and only correct moral rules are recognized as law, and since everyone is morally impeccable, this is enough direction to tell everyone which rules are law. In order for those moral norms to be law for positivists, they must be backed by social pressure. So Himma adds an institutional system of sanctions which punish those who are weak-willed enough to be immoral (Himma 2014, 97).

Hart's answer to the Grounding Question tells us that the rules from Himma's model are laws. A rule of recognition picks out which primary rules are obligatory, and sanctions are used to enforce those rules as guides to conduct. If we can agree that Himma has described a legal system here, then he has proven that it is possible to include moral criteria in a rule of recognition. This is the claim that sets inclusive positivism apart from exclusive positivism.

In addition to defending Hartian inclusive positivism from Raz, Himma modifies Hart's answer to the Normative Question. Himma suggests that the kind of social pressure that grounds legal obligation will come from the authorization of coercion as a tool to enforce norms (Himma 2011, 12-13). Citizens become obligated to follow some law when legal officials are authorized to punish those who do not comply with the law. When legal officials are not authorized to punish someone for violating a rule, that rule is truly only advisory rather than obligatory (Himma 2011, 15). Although he distinguishes the authorization of coercive sanctions from the application of coercive

sanctions, Himma does not give a detailed account of what he means by “authorization”. Perhaps he has in mind some form of voluntarism in which citizens approve of the law and agree to be subjected to punishments should they violate them.

Himma also modifies the positivist answer to the Normative Question by describing the obligation to follow the law as prudential. By a prudential reason, Himma means a reason which is relevant to the self-interest of the party in question. Because avoiding sanctions is within everyone’s self-interest, people have reason to follow the law (Himma 2011, 17).

Himma’s reasoning for this is that legal reasons must be reducible to one of three kinds of basic reason: moral reasons, prudential reasons, or aesthetic reasons. To say that legal reasons are inherently reducible to moral reasons would make positivism unable to satisfy a key desideratum encapsulated in the Separation Thesis, which is the conclusion that obligations to obey the law are not necessarily consistent with morality. Himma dismisses the idea that aesthetic reasons could ground an obligation to obey the law out of hand, as it seems that aesthetic reasons are just not strong enough to warrant the kind of coercive enforcement which is crucial to this kind of obligation. So Himma concludes that obligations to obey the law must inherently be a type of prudential obligation.

Himma’s argues against Raz’s addition to the Grounding Question, advocating for an inclusive account similar to Hart’s. He also Hart’s answer to the Normative Question, arguing that the law is normative in virtue of prudential reasons that citizens have to avoid sanctions.

## **The Natural Law Theorists**

### **Claims**

For the purposes of this thesis, I consider two natural law theorists writing after Hart. The first is John Finnis, who is credited with the definitive restatement of the natural law position in his book

*Natural Law and Natural Rights* (Finnis 1980). The second theorist is Mark Murphy, who reinterprets the work of other natural law theorists including Finnis with a different, weaker reading of the natural law position (Murphy 2006). Before exploring these views, it is worth mentioning that neither of these theorists argues against the positivist idea that some rule must satisfy a rule of recognition in order to be law. While they can accept that some norm is law partly in virtue of fulfilling the rule of recognition's criteria, the natural law theorists add to the positivist answer to the Grounding Question.

Broadly, this addition is that the law is backed by reasons for compliance. Finnis is more specific in enumerating these reasons, tying them to an account of basic goods and principles of practical rationality, which I'll explain in his section below. Murphy has a less restrictive account of the reasons to follow the law, which accommodates the prudential reasons that positivists hold to back law.

Sometimes the natural law position is stated using some formulation of "there is a necessary connection between law and morality". As we'll see, the natural law theorists hold this to be true, but this phrasing can be misleading. Neither natural law theorist discussed here believes that legal rules are coextensive with moral rules, although Finnis argues that moral rules and legal rules both follow from certain principles of practical reason.

Since natural law theories state that (non-defective) laws will be backed by reasons, they are able to answer the Normative Question more clearly than positivism. On their account, the law is normative in virtue of the reasons which justify its existence (if any).

## **Finnis**

While Finnis presents a very different account than any of the positivists, he praises the work of Hart and Raz, and ultimately agrees with much of what they say about the law including the

importance of social pressure and a rule of recognition in constituting law (Finnis 1980, 276-277). However, Finnis' strong natural law position includes a significant addition to these requirements. He adds that in order to count as law, a norm must be the result of correct practical reasoning about the common good of the community. As I'll explain, this addition allows the natural law theorists to answer the Normative Question more clearly than the positivists.

Finnis' account of law is accompanied by an account of basic goods and practical reasons, which is crucial to understanding Finnis' answer to the Grounding and Normative Questions. According to Finnis, there are seven "basic goods" that are self-evidently valuable to humans. They are knowledge, life, play, aesthetic experience, friendship, religion, and practical reasonableness (Finnis 1980, 86-90). Finnis believes that each of these is valuable in and of itself, and that each is self-evident. The last of the basic goods, practical reasonableness, plays a special role in Finnis' account of law.

For Finnis, each of the seven basic goods grounds some reasons for action. For instance, because knowledge is a basic good one has reason to learn. The strength of this reason depends on the individual, because people prioritize the basic goods differently (Finnis 1980, 63). Practical reasonableness is about deciding how to prioritize these goods for oneself and how to go about pursuing them (Finnis 1980, 100). Finnis argues that as a self-evident truth, it is good to be in control of how you go about participating in the basic goods.

The good of practical reasonableness is of special importance to Finnis' account of law because he sees being practically reasonable as a crucial component of self-actualization (Finnis 1980, 109). In order to be practically reasonable, one must fulfill nine requirements related to the basic goods.<sup>2</sup> Finnis says that we can think of these requirements as moral obligations, and that

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<sup>2</sup> These include that one must have a coherent plan in life, that one must not show arbitrary preferences between people or values, that one must have an appropriate level of commitment to his projects, that one pursues the basic goods with



practical reason is foundational to morality (Finnis 1980, 126). In order to understand Finnis' answer to the Normative Question, the most important of these is the requirement that one "favor and foster the common good of one's communities" (Finnis 1980, 125).

By the "common good," Finnis means a set of conditions in which a community can reasonably participate in the basic goods (Finnis 1980, 155). We have reasons to partake in the basic goods, but doing that effectively often requires a community. Friendship (broadly understood) might be the clearest example of this; it would be impossible to enjoy this basic good without living in some kind of community with other people. But we would be hampered in pursuing many of the other basic goods without help from others as well. For example, one would have far less success pursuing knowledge without a group of people to learn from.

So, the basic goods ground reasons for us to live in communities that allow us to bring about the common good. In such a community, some people will not be practically reasonable and will not foster the common good. But Finnis argues that even if everyone in the community were practically reasonable, the common good would still necessitate certain rules of shared conduct. This is because for Finnis, the common good is not something that is fixed. There may be many reasonable determinations of the common good, consisting of different reasonable ways to participate in the basic goods (Finnis 1980, 231-232). In order to effectively pursue any of these determinations, we must first make a decision about which reasonable determination of the common good to aim for.

According to Finnis, the only two ways of making that determination for an entire society are through unanimous agreement or through authority. However, unanimous agreement is impossible for the large and complex societies which are common today. Finnis uses Raz's terminology in defining authority, saying that an authoritative statement is one which is treated as an

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a modicum of efficiency, that one respect each basic good in every act, that one fulfills the requirements of the common good, and that one follows his conscience (Finnis 1980, 103-125).

exclusionary reason for action (Finnis 1980, 232). As I've explained, this means that one treats an authoritative statement as a reason to disregard some other reasons which are relevant to the decision in question. This is how authority can solve coordination problems; by eliminating some countervailing reasons so that everyone is unified in a course of action. To foster the common good, we need to change some people's reasons for action. We have reason to promote the common good, so we have reasons to solve coordination problems by establishing authoritative standards which set one determination of the common good.

The idea that the law is uniquely equipped to foster the common good helps Finnis to answer the Normative Question. He sees an obligation to follow the law as a rational necessity; we should obey the law because we must do so in order to solve coordination problems that are worth solving (Finnis 1980, 303-304). In other words, failing to follow the law is deeply practically unreasonable. The relationship between law and morality is that we have a moral requirement to be practically reasonable, which obligates us to follow the law. Finnis accommodates the positivists' requirements for law through practical reason as well. We need a system of authoritative rules in order let us attain the common good, and rules of recognition are the most reasonable way to adopt rules into such a system (Finnis 266-268).

In summary, Finnis adds significantly and controversially to the positivist answer to the Grounding Question with his account of basic goods and practical reasons. His explanation for why a rule is a law adverts not only to social facts, but also to practical reasons. While conformance with a rule of recognition is necessary to ground law, it is not sufficient. If a rule satisfies a rule of recognition but is not practically reasonable, Finnis does not define it as a law. These additions allow him to answer the Normative Question more clearly than the positivists by saying that the law has normative force in virtue of practical and moral obligations to obey the law, which result from law's unique ability to solve coordination problems.

## Murphy

In his book *Natural Law in Jurisprudence and Politics*, Mark Murphy suggests a different interpretation of the natural law tradition. As Murphy sees it, the fundamental claim of natural law jurisprudence is that laws are backed by decisive reasons for action (Murphy 2006, 1). He lays out two readings of this claim, one strong and one weak, before supporting the weak reading.

The strong reading of this natural law claim is that any rule which is not backed by decisive reasons is not a law. This reading sees the backing of decisive reasons as a necessary condition for something to be law; dictates which are not backed by decisive reasons are counted out from the class of laws. The weak reading states that laws which are not backed by decisive reasons are defective in their capacity as law (Murphy 2006, 10). On the weak reading, the requirement that law be backed by decisive reasons is what Murphy calls a “nondefectiveness condition” (Murphy 2006, 45). I’ll now explain what he means by this.

Murphy defines defectiveness as it relates to the characteristic activity of something. For example, pigeons characteristically have the ability to fly. But if we came across a pigeon with a wing injury, it would not seem right to classify it as a non-pigeon. We could simply call it a pigeon, but this might be misleading because a listener may think we are referring to something that can fly. Murphy thinks that the best way to describe the pigeon is as a defective pigeon, because although it clearly shares many traits with pigeons, it lacks or is deficient in one of their key identifying features.

Murphy argues that we should think of unjust or unreasonable laws in the same way. Laws are characteristically backed up by genuine and decisive reasons for action. Some statute that is not backed by decisive reasons shares so much in common with a law that it seems wrong to count it as a non-law. However, it also differs from the central case of a law so much that it seems like its classification as law deserves qualification.

Murphy offers two arguments for accepting the weak reading of natural law theory, which I'll sketch briefly here. The first is the Function Argument, which states that the function of law is to be a rational standard of conduct. This function cannot be fulfilled without the law being backed by decisive reasons, so it makes sense to think of laws which are not supported by reasons as nonfunctional and defective (Murphy 2006, 35). The second argument is the Illocutionary Argument, in which Murphy states that it makes sense to think of the law as a speaker who demands compliance from its subjects. But a demand not backed by reasons is defective; so laws not backed by decisive reasons are defective too (Murphy 2006, 36).

In developing this answer to the Grounding Question, Murphy takes a different approach than Finnis. He grants that if a norm satisfies a rule of recognition, it is appropriate to classify it as law. However, any law will be defective unless it is backed by decisive reasons. This answer is accommodating to the positivists, as Murphy is willing to include prudential reasons among these decisive reasons (Murphy 2006, 54).

Murphy's answer to the Normative Question also differs from Finnis'. Recall Finnis' argument that humans are faced with certain coordination problems that obligate us to follow the law. Murphy refers to this argument as the "salient coordinator account" (Murphy 2006, 105).

According to Murphy, the salient coordinator account only establishes that it is good to follow the law, but not that there is an obligation, or decisive reason, to do so (Murphy 2006, 109). While it would be a good thing to solve the coordination problems, Finnis never tells us why solving them with law is obligatory. Perhaps while it would be best to solve these problems with law, it would be permissible not to solve some coordination problems, or to solve them using other means besides following the law.

In order to solve this problem with Finnis' account, Murphy comes up with a unique account of consent that he thinks can ground an obligation to obey laws which are not otherwise

defective. Murphy argues that if people have consented to follow the law, this can make following the law obligatory for them (Murphy 2006, 112). However, Murphy is aware of the issues faced by consent accounts historically. Most citizens do not explicitly consent to follow the law, so many consent theories claim that some activity such as voting or living in a country signals tacit consent to follow the nation's laws (Murphy 2006, 97). The trouble with tacit consent is that there seem to be no good candidate activities that would signal binding tacit consent. Some candidates that have been suggested include voting, living within the law's jurisdiction, or enjoying the benefits of living under the law. As Murphy points out, the trouble with each of these candidates is that withdrawing consent is too costly in each case (Murphy 2006, 98). If a person needs to sell her home and move in order to withdraw her tacit consent, this seems to manipulate the consent relationship. She may continue to signal consent although she only does so because it is so costly to leave, and not because she actually wishes to consent. Tacit consent accounts seem to make consent less voluntary; but the entire attraction of consent accounts is that they construe the obligation to follow the law as something that is undertaken voluntarily by citizens.

Murphy tries to avoid these issues by identifying consent not with a specific action, but with a general disposition of accepting the law's determination of the common good. Recall that the common good can be comprised of many different combinations of basic goods. In order to effectively reach the common good, we need to select one "determination", or one set combination of the basic goods, to pursue. While citizens can differ about which determination of the common good they would most prefer, the practically reasonable citizens will accept the law's determination of the common good because they understand the salient coordinator argument. The value of having everyone agree on one goal makes it reasonable to accept the determination of the common good which is set by the law (Murphy 2006, 127).

So Murphy's answer to the Normative Question is similar to Finnis' insofar as the salient coordinator account justifies some level of obedience to laws. However, Murphy makes it clear that following all law is not obligatory in his picture. Non-defective laws will be backed by decisive reasons for action, but these reasons are not powerful enough to create an obligation unless one renders acceptance-consent to the law.

## Section 3

In section 2, I identified several desiderata that both positivism and natural law theory attempt to satisfy. In answering the Grounding Question, each theory attempts to satisfy the following desiderata:

- A) An acceptable legal theory must imply that there are positive laws (i.e., rules enforced by governments).
- B) An acceptable legal theory must explain why these positive laws hold.

In answering the Normative Question, positivism and natural law theory attempt to satisfy these desiderata:

- C) An acceptable legal theory must show that citizens generally have strong reasons to follow the law.
- D) An acceptable legal theory must explain why there are reasons follow the law.

In this section, I will discuss two more desiderata that these theories aim to satisfy. They are:

- E) An acceptable theory of jurisprudence must explain the difference between rules that are enforced by governments and moral rules.

- F) An acceptable theory of jurisprudence must explain the law in a way that comports with a “privileged viewpoint”<sup>3</sup> of some segment of society

These last two desiderata help to explain some of the underlying motivations for accepting positivism and natural law theory. I’ll explain each one below, as well as how the different theories satisfy them.

## **Distinguishing Positive Law from Morals**

The first desideratum I’ll discuss in this section is that each theory attempts to distinguish the rules that are ratified and enforced by governments, “positive law”, from moral rules. Each of these theories acknowledges that positive law and moral rules needn’t be coextensive. As I’ll explain, positivism satisfies this desideratum very explicitly through the Separation Thesis, which states that since rules of recognition do not need to contain moral criteria for law, it is possible for laws to be inconsistent with ethics. Strong natural law theory satisfies this desideratum by distinguishing a focal meaning of law from a periphery meaning under which laws can be inconsistent with morals. Weak natural law theory accommodates this distinction by using rules of recognition as an existence condition for law, but using reasonableness as a non-defectiveness condition for law.

### **Positivism: The Separation Thesis**

Each positivist I’ve discussed supports the Separation Thesis, which states that rules of recognition do not need to contain moral criteria for law. Rules of recognition can be thought of as tests for

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<sup>3</sup> As I’ll explain below, what I mean by this term is that each theory wishes to describe the law in a way that comports with the understanding of a certain segment of society. Where positivists accommodate the viewpoint of regular citizens, natural law theorists accommodate the viewpoint of practically reasonable citizens.

what counts as a law within a given system, but the content of these tests can vary greatly. The Separation Thesis asserts that of all of the possible rules of recognition that could be used by a legal system, at least one of them allows for immoral rules to be law. This is a crucial unifying theme of positivism, pithily expressed by John Austin in his statement that “the existence of law is one thing, its [moral] merit or demerit another” (Austin 1832, 278). Austin wrote before Hart developed the idea of rules of recognition, but he is suggesting here that we should use different tests to determine which rules are law than we use to determine which rules are moral.

Hart expresses the motivation for the Separation Thesis explicitly in his essay “The Separation of Law and Morals” (Hart 1958, 198). According to Hart, the positivist concern is that a theory that requires laws to be consistent with ethics may lead people to conflate legal and ethical requirements. This leads to two worries. The first is that citizens may assume that any positive law that satisfies the rule of recognition must be ethical. The concern here is that if a rule of recognition identified some deeply immoral rules as law, people might unquestioningly follow them under the assumption that all law must be consistent with ethics. The second worry is a mirror image of the first: it is that people would assume that any moral opinion that they hold ought to be enforced by the law. Someone with a confused moral outlook could then use the coercive force of the law to advance morally wrong goals (Hart 1958, 198).

As I’ve explained, the Separation Thesis is also affirmed by Himma and Raz. Raz supports a stronger reading of the Separation Thesis on which the requirements of the rule of recognition ground the law, but these requirements cannot be moral ones, because that would undermine the law’s claim of legitimate authority.

## **Strong Natural Law: The Focal Meaning of Law**



Finnis believes that ethical and legal requirements will be consistent with one another because both are deductions from principles of practical reason. By this, Finnis does not mean that it is an ethical requirement to follow any rule that is ratified by a legal system. Finnis acknowledges that unjust and unreasonable rules are frequently called “law”. In order to distinguish between unjust rules that are often called “law” and his use of the term, Finnis claims that the concept of law he develops throughout *Natural Law and Natural Rights* is a “focal meaning” of law. By this, Finnis means a definition of law intended to capture the fullest instantiation of, or essence of, law rather than a list of necessary and sufficient conditions for law (Finnis 1980, pg. 10). The focal meaning of law will point out the central usage of the term “law”.

According to Finnis, when people use the term “law” to describe an unreasonable ordinance of a government, they are being colloquial by using a non-focal meaning of the word. In this way, applying the term “law” to unreasonable government mandates is like applying the term to “laws” of physics. Finnis isn’t interested in policing how fields like physics use the term “law”; instead, he is interested in developing a focal concept of law for use in jurisprudence (Finnis 1980, 11). Similarly, Finnis is not interested in admonishing people for using the term “law” to colloquially refer to unreasonable government mandates (Finnis 1980, 365). However, he does think that it would be confused for a theory of jurisprudence to deliberately accommodate unreasonable laws. This would be akin to trying to accommodate laws of physics with a theory of jurisprudence.

Finnis satisfies the desideratum of separating positive law from morals by distinguishing unreasonable “law” from law in the focal sense. While there is a colloquial sense in which legal requirements are sometimes unethical, for the purposes of jurisprudence we should stick to the focal meaning under which legal and ethical requirements are consistent because both follow from principles of practical reason.

## **Weak Natural Law: Distinction Between Defective and Non-defective Law**

Murphy satisfies the desideratum of distinguishing positive law from morals by suggesting that there are internal standards to law such that unreasonable laws are defective, although they are still law. In explaining this, Murphy endorses a formulation of the Separation Thesis, which is a modified version of a claim made by Jules Coleman, a positivist. It reads:

there exists at least one possible rule of recognition (and therefore one possible legal system) that does not specify compatibility with true practical principles among the truth conditions for any proposition of law. (Murphy 2006, 22)

Murphy's acceptance of this formulation of the Separation Thesis implies that he agrees with the positivists that an unreasonable government mandate can be law (in a sense that is relevant to jurisprudence). He therefore concedes that law does not need to be backed by decisive reasons, although he states his belief that legal systems are characteristically backed by decisive reasons (Murphy 2006, 54-55).

Murphy allows that prudential reasons may be among the decisive reasons that back up laws, but he thinks that as a consideration of charity we should not hold prudential reasons as the characteristic reason for action provided by laws. This is because according to Murphy, the law conceives of itself as being justified (Murphy 2006, 55-56). The language used in the law suggests that sanctions are justified by some other type of reason beyond the prudential reasons they create. While sanctions only apply to the fraction of criminals who are caught, the decisive reasons that back up non-defective law are meant to apply to everyone. So it seems that the law conceives of itself as justified by reasons beyond the sanctions it levels against violators.

If this is the case, Murphy thinks that we should consider the law to be characteristically backed by something beyond prudential reasons. He explains why this is using the analogy of a ruler who, like the law itself, imposes rules on people, which are backed by sanctions. Murphy says:

Given the sincerity of her rule-imposing acts and her knowledge of the limitedness of her capacity to give reasons for action through sanctions, it seems charitable to hold that her belief in reasons for compliance springs not from her coercive power but elsewhere. (Murphy 2006, 56)

The upshot of this analogy is that since the law conceives of itself as being backed by something beyond prudential reasons, it would be uncharitable to consider prudential reasons as the characteristic type of reason which backs law. While people may often have prudential reasons to follow the law, characteristically legal systems are backed by further reasons.

Murphy's approach to this desideratum combines elements of each of the other theories. The Separation Thesis holds true, so we cannot count something out of the class of laws just because it is inconsistent with ethics. However, law not backed by decisive reasons (and therefore not captured by Finnis' focal meaning of "law") should be considered defective in its capacity as law. Murphy therefore does not use the connection to practical reason from Finnis' account as an existence condition for the law, but rather as a non-defectiveness condition.

So Murphy satisfies desideratum E) by distinguishing the existence conditions for law from defectiveness conditions for law. We should understand the Separation Thesis as true when we're classifying things as laws; but when we move to evaluating laws, we should consider the reasons that back them.

## Identify a “Privileged Viewpoint” from Which to Explain Law

Each theory I discuss here intends to describe the law in a way that is consistent with some segment of society’s understanding of law. Positivists describe law in a way that is consistent with the understanding of regular citizens in a legal system, where Finnis seeks only to accommodate the viewpoint of those citizens who are practically reasonable.

I’ll refer to each of these different viewpoints as a “privileged viewpoint” about the law. Any time I mention a privileged viewpoint, I am referring to a viewpoint about the law which is shared by some segment of society. These viewpoints are “privileged” in the sense that a theory seeks to produce results which are compatible with it. So positivism privileges the viewpoint of regular citizens, because the positivists wish to explain the law in a way that is consistent with regular citizens’ understanding. Finnis privileges the viewpoint of practically reasonable citizens; he seeks to develop an account which is consistent with their understanding of the law. Murphy suggests that we use these two viewpoints differently. He suggests that the broad viewpoint used by the positivists is appropriate for use in identifying law, but that the narrower viewpoint used by the strong natural law theorists is what we should use to evaluate law as defective or non-defective (Murphy 2006, 58-59).

## Positivism: Accommodate the Understanding of All Citizens

The methodology used by Hart and Himma reveals that they wish to describe the law in a way that comports with how regular citizens understand it. Each of them argues by tracing the meaning of words as they are used by regular citizens. An example of this is when Hart argues that it *seems wrong* to use words like “obligation” when talking about the mugger. In arguing that the use of the word seems wrong, Hart is suggesting that we should reject this use of the word “obligation” because it is not compatible with the regular use of the term. Himma refers to this strategy as “modest

conceptual analysis”, which is reasoning to the nature of something by tracing peoples’ linguistic practices (Himma 2020, 32-36). According to the methodology of Hart and Himma, the way that people use the word “law” and related terms should determine, or at least be consistent with, our philosophical requirements for law.

Hart and Himma also wish to accommodate the way that regular citizens understand *why* people follow the law, when they do so. Recall that under a positivist account, there are two explanations of why one would follow the law. One is that people take the internal perspective regarding the law. This means that they see the law as a guide for their conduct, and that they see violating the law as grounds for criticism. The other is that people follow the law because they would be punished for breaking it, meaning they have a prudential reason to follow the law.

Between the internal perspective and the prudential reasons provided by sanctions, positivists can explain why people follow laws in a way that is consistent with the view of any citizen. If we were to ask a citizen who complies with the law why she does so, she could give us an answer consistent with positivism. Either she follows the law because she takes the internal perspective and sees it as an appropriate guide for her conduct, or because she is afraid of what might happen if she does not. So the positivist view captures the way that regular citizens understand obedience to the law whether they are practically reasonable or not, and whether or not they take the internal perspective to the law.

Raz accommodates the regular citizen’s understanding of the law to a lesser extent than Hart and Himma. His theory is complex, and it seems unlikely that the average citizen could reproduce his series of deductions about the nature of authority. Therefore, I believe he does not prioritize the citizens’ understanding of what the law is to the same extent as Hart and Himma. However, sanctions are central to his account. Because citizens do not have a genuine reason to follow the law, they must be psychologically motivated to obey the law by sanctions.

## **Strong Natural Law: Privilege the Understanding of Practically Reasonable Citizens**

Unlike the positivists, Finnis is not interested in explaining the law in a way that comports with the view of regular citizens. Since he believes that not all citizens are practically reasonable, he thinks that we should privilege the viewpoint of practically reasonable citizens by describing the law as they understand it. This is because practically reasonable citizens will appreciate the principles that ground the law, so we can get a better understanding of the law by adopting their viewpoint than by adopting an average citizen's viewpoint.

To that end, Finnis describes law according to a focal meaning which expresses not only *why* practically reasonable citizens take the internal perspective, but also why they are right to see the law as a binding standard of conduct. Since practically reasonable citizens will understand the need to solve coordination problems using the law, they will act as though they have a reason to follow the law which is separate from sanctions (Finnis 1980, 15).

Finnis acknowledges that people have many distinct motivations to follow the law, but he criticizes the positivists for accommodating the perspective of those who “merely acquiesce” to the law for fear of social pressure (Finnis 1980, 13). Instead, Finnis thinks that we should privilege the focal meaning of law which is understood by practically reasonable citizens. These are the citizens who follow the law for the right reasons, namely, the reasons provided by the requirement to foster the common good.

This amounts to a narrower privileged viewpoint than the one used by positivists. Rather than a definition which is consistent with any citizen's understanding of law, we only need to accommodate the view of those who understand the focal meaning of law and its practical implications.

## **Weak Natural Law Theory: Use Each Viewpoint Differently**

Mark Murphy sees some strengths to positivism, and one of the underlying motivations of weak natural law theory is to combine these with the strengths of natural law theory. Murphy's adoption of the Separation Thesis and his account of law's defectiveness conditions enable him to make use of both of the privileged viewpoints explained above.

Murphy grants that not all laws will be reasonable. This suggests that when we go about identifying laws, we should privilege a viewpoint which is consistent with that of regular citizens rather than the most reasonable citizens. Restricting our viewpoint to practically reasonable citizens in identifying the law might cause us to misclassify unreasonable laws as non-laws. However, according to Murphy, in order to know whether a law is defective we must understand whether or not it is backed by decisive reasons. This will require a perspective similar to the one used by Finnis, as presumably not every citizen will know whether a certain law is backed by decisive reasons. Weak natural law theory therefore privileges the viewpoint of regular citizens in identifying law, but privileges the viewpoint of practically reasonable citizens in evaluating laws as defective or non-defective.

## **Section 4**

In section 2, I discussed how each theory answers the Grounding and Normative Questions. In section 3, I discussed two additional desiderata that shed light on the motivations for embracing each theory. Each view must separate positive law from moral rules, and each theory must either accommodate a regular citizen's understanding of law or the view of practically reasonable citizens

(in Murphy's case, both). In this section, I will compare how well these theories satisfy the four desiderata that arise from the Grounding and Normative Questions. They are:

- A) An acceptable legal theory must imply that there are positive laws (i.e., rules enforced by governments).
- B) An acceptable legal theory must explain why these positive laws hold.
- C) An acceptable legal theory must show that citizens generally have strong reasons to follow the law.
- D) An acceptable legal theory must explain why there is reason to follow the law.

After evaluating each theory, I will offer two comments which are meant to be exploratory in nature, highlighting interesting directions that the field may go from here. Finally, I will describe some striking similarities between the strongest positivist and natural law theories.

## **Considerations for the Positivists**

### **The Grounding Question**

A strength of positivist theories is that they have a very clear answer to the Grounding Question: a rule's status as law is determined by whether or not it satisfies a rule of recognition in a given legal system. This answer is informed by the two desiderata I discussed in section 3: that an acceptable theory must distinguish moral rules from positive law, and that an acceptable theory must identify a privileged viewpoint that its jurisprudence comports with. Positivism clearly distinguishes moral rules from legal rules by establishing a specific procedure, a rule of recognition, which rules must go through in order to become law. The positivists' answer to the Grounding Question also captures the view of everyday citizens within the legal system, whether they take the internal perspective on the law or not.



This is a strong answer to the Grounding Question; it implies that there are positive laws and explains their existence. However, as I'll explain next, answering the Normative Question is more challenging for positivists.

## **The Normative Question**

Hart improved upon the work of Austin by recognizing that normativity in the law is constituted by more than orders and sanctions. Hart mentions a difference between being obliged, or psychologically motivated, and being obligated. However, because he does not make this distinction clear, Hart does not have a clear answer to the Normative Question. While it's clear that Hart is searching for something beyond a mere psychological inclination to follow the law, he does not give us a developed account of genuine reasons to do so.

Himma, the other inclusive positivist, modifies Hart's answer to the Normative Question by claiming that sanctions give citizens a prudential reason to follow the law. Beyond whether or not they feel compelled to follow the law, people are warranted in following the law in the sense that it is in their own self-interest to do so. This is a more developed answer to the Normative Question than Hart's.

Raz insists that although the law claims legitimate authority, this claim is false most of the time. The law therefore does not change peoples' protected reasons for action such that their behavior conforms with the balance of reasons which actually apply to them. In other words, the law does not satisfy the Normal Justification Thesis. So Raz's answer to the Normative Question is that there are no inherent reasons to follow the law. Rather, on Raz's account the law generally provides people with psychological motivations to comply with it. This is a similar conclusion to Hart's.

In summary, Hart and Raz seem interested in addressing the Normative Question, but their answers raise questions about whether the law is only backed by psychological motivations or by genuine reasons for action. Himma's answer to the Normative Question is the clearest of the positivists, and it explains why positivists can only answer the Normative Question by referring to prudential reasons.

The fact that only prudential reasons are available to answer the Normative Question puts positivists in a somewhat vulnerable position. It may be that prudential reasons to follow the law are scarce or absent. For example, it may be that it's very easy to break some laws without being caught. If prudential reasons to follow the law are not widespread, positivism does not satisfy desideratum C) above, that a theory must show that their citizens generally have strong reasons to follow the law.

## **Considerations for the Natural Law Theorists**

### **The Grounding Question**

Like the positivists, natural law theorists have a clear answer to the Grounding Question. Finnis builds an account of basic goods and practical reasons from which one can deduce laws (in the focal sense). These rules are law in virtue of their connection to practical reasons and the basic goods.

Like the positivists, Finnis makes rules of recognition and sanctions central to his account, but he adds that these features are requirements for the law because they are required by practical reason.

Murphy has a more nuanced answer, which states that while unreasonable laws can exist, laws have internal standards that classify them as defective.

### **The Normative Question**

The advantage that natural law theories have is that they present a stronger answer to the Normative Question than the positivists. Finnis' theory clearly identifies reasons to follow the law through the salient coordinator account, which states that people have reason to follow the law because principles of practical reason obligate us to solve coordination problems. Since obedience to the law is the only reasonable way to solve these problems, we have an obligation to obey the law.

Murphy offers a different answer than Finnis to the Normative Question. He points out that the salient coordinator account does not imply that there is always a strong reason in favor of following the law. What the salient coordinator account shows, according to Murphy, is that it would be a good thing for the law to coordinate citizens' behavior by giving them decisive reasons for action (Murphy 2006, p. 109). But this does not show that the law *must* give citizens a decisive reason for action. People have a decisive reason to foster the common good, but there are many ways to do this. The fact that following the law is a particularly apt way to foster the common good does not show that one must always foster the common good by following the law. However, Murphy does state that the aptness of the law for solving coordination problems will be appreciated by practically reasonable citizens, so they will follow the law.

According to Murphy, laws not backed by decisive reasons (such as the common good) are defective. Like a pigeon that cannot fly, they cannot perform their characteristic activity, which is guiding citizens' behavior by providing them with decisive reasons for action. Defective laws will not promote the common good or instantiate any other decisive reason for action.

Having shown that the salient coordinator account does not imply that following all law is obligatory, Murphy addresses the question of what does make following the law obligatory. Someone has an obligation to follow the law only if they have given acceptance-consent to the law. This means that they have accepted the law's determination of the common good as the one they shall pursue. If one has committed oneself to promote the law's conception of the common good in

this way, one has an obligation to foster *that* determination of the common good rather than any other. So, acceptance-consent grounds decisive reasons to follow the law.

In giving this answer to the Normative Question, Murphy presents two possibilities. Either laws are authoritative, meaning they provide people with decisive reasons for compliance, or they are not authoritative (Murphy 2006, 109 & 132). If they are authoritative, this is because people have given them acceptance-consent. If people have not given acceptance-consent to the law, this could be for two reasons. Either the law is so deeply unreasonable that the citizens rightly reject it, or the citizens are being unreasonable by failing to appreciate the salient coordinator account. So while strong natural law theory holds that it is a practical obligation to follow all law, weak natural law theory has two explanations of why it may not be obligatory to follow the law: either the citizens are unreasonable, or the law itself is.

If the salient coordinator account does not show that following the law is obligatory, this presents an issue for Finnis' answer to the Normative Question. While he can explain that it is good to follow the law, his theory does not include something like acceptance-consent to make following laws obligatory. For this reason, I believe that Murphy offers a stronger answer to the Normative Question than Finnis. Weak natural law theory can explain if and when following the law is obligatory, but without modification strong natural law theory cannot. This is particularly concerning given that strong natural law theory makes stronger claims about obligations to follow the law, claiming that citizens have an obligation to follow any genuine law.

Murphy's theory tells us when someone has an obligation to follow the law; but it doesn't tell us that people are obligated to follow all laws. This raises the question of how widespread obligation to follow the law is, and to answer that question we would need to determine how widespread acceptance-consent is. While it would be desirable for a theory to answer this question,

Murphy's answer to the Normative Question is still more acceptable than Finnis', because it can tell us when and why people are obligated to follow the law.

## **Interesting Directions for Future Study**

I now want to offer two exploratory comments that aren't meant to advance any new arguments from those already presented in this thesis. Rather, they are meant to highlight interesting directions that the field could move forward from here. My first comment is about how Himma's theory interacts with Murphy's; my second is about how Murphy's theory interacts with Raz's.

The first comment I want to offer regards Himma's inclusive positivism and Murphy's weak natural law theory. I believe that these two theories may be able to make use of each other's answer to the Normative Question. Recall that Himma's answer to the Normative Question is that people are given prudential reasons to follow the law when coercive enforcement mechanisms are authorized. As I stated earlier, it's unclear what constitutes authorization for Himma.

Here is one interesting possibility: acceptance-consent. Acceptance-consent is a general disposition of accepting the law's determination of the common good. Can we think of this as a way of authorizing coercion? If citizens accept that they must follow the law to bring about the common good, they may also accept that they will be punished for breaking the law. If that's the case, it may be fair to construe acceptance-consent as a form of authorization of coercion. This is an interesting result, although it does not dispel the issue of determining how widespread acceptance-consent actually is. If it somehow comes to light that acceptance-consent is not widespread, Murphy's theory may be able to employ Himma's answer to the Normative Question. Rather than requiring that acceptance-consent ground the law, a weak natural law theorist could say more generally that people must authorize some form of coercion being used upon them in order for following the law to be obligatory.

The second observation I'd like to offer is that in the absence of acceptance-consent, Murphy's theory could collapse into something quite like Raz's. Murphy doesn't rely on the assertion that the law claims legitimate authority, but he does express a similar idea: that the law is committed to being backed by decisive reasons for action (Murphy 2006, 53). Murphy makes it clear that he does not endorse Raz's thesis, but he also states that this is something that is entailed by the law's claim of legitimate authority. So Raz should be willing to agree with Murphy that the law is committed to being backed by decisive reasons. However, Raz would argue that while the law is committed to this, it does not, in fact, fulfill this commitment.

If a weak natural law theorist such as Murphy were willing to allow that the law claims legitimate authority, and if acceptance-consent is not widespread, weak natural law theory will have much in common with Raz's exclusive positivism. Raz believes that the law claims legitimate authority but does not actually have it. Murphy believes that following the law is only obligatory if you have shown it acceptance-consent, as this grounds one's obligation to follow the law. If the law claims authority but acceptance-consent is not widespread, the law falsely claims legitimate authority. One way to avoid this conclusion would be by backing off the claim that acceptance-consent grounds authority, and adopting Himma's requirement that the law is authorized to use coercive force.

These two observations, I think, point out interesting new directions for positivism and natural law theories to explore. If acceptance-consent is widespread, it seems that the weak natural law thesis is very amenable to inclusive positivism. However, if acceptance-consent is scarce, weak natural law theory bears some resemblance to Raz's exclusive positivism.

## **Similarities in The Strongest Theories**

Each theory I've discussed has a clear answer to the Grounding Question, but their answers to the Normative Question differ in strength. Himma gives the strongest answer of the positivists, and Murphy gives the strongest answer of the natural law theorists. Interestingly, these theories are compatible: in responding to Raz, Himma affirms that there may be moral criteria law, although the law only inherently provides people with prudential reasons for action. Murphy affirms that not all laws are backed by decisive reasons. While positivism and natural law theory may appear to be completely opposed, the most plausible and developed versions of these theories are quite similar. Both of these theories acknowledge the importance of a rule of recognition for answering the Grounding Question, and each allows that the law can give rise to prudential and moral obligations.

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